U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 December 2002

CASE NOS.: 2002-LHC-1048
2002-LHC-1049

OWCP Nos.: 5-112577
5-112669

In the matter of

DANIEL FARQUHANSON,
Claimant

v.

TIDEWATER CONSTRUCTION CORPORATION,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest

APPEARANCES:

Gregory E. Camden, Esquire
For the Claimant

Brian L. Sykes, Esquire
For the Employer

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This case arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et. seq.*, hereinafter referred to as the "LHWCA" or the "Act" and the implementing regulations, 20 C.F.R. parts 701 and 702. The Act provides compensation to certain employees (or their survivors) engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring upon the navigable waterways of the United States or certain adjoining areas, resulting in

disability or death. With limited exceptions, the Act provides the exclusive remedy for such injuries against maritime employers which have secured the payment of benefits. See 33 U.S.C. § 905(a).

PROCEDURAL HISTORY[1]

The claimant filed his claim on October 16, 2001. The claimant seeks temporary total and permanent partial disability benefits for injuries sustained on August 5,1999 and on August 16, 2000. On February 5, 2002, the Director, Office of Workers' Compensation Programs (OWCP), referred this case to the Office of Administrative Law Judges (OALJ) for a hearing. The case was assigned to me on June 10, 2002.

A formal hearing was held before the undersigned on October 16, 2002, in Newport News, Virginia, at which the parties were given a full and fair opportunity to present evidence and argument. No appearance was entered for the Director, Office of Workers' Compensation Programs ("OWCP"). Claimant's Exhibits (CX) 1- 12 and Employer's Exhibits (EX) 1- 6 were admitted to the record without objection. I accepted ALJ Exhibits I and II, stipulations. The record remained open post hearing for the submission of closing briefs, received on December 20, 2002.

I. STIPULATIONS[2]

The parties stipulated and I find:

A. The claimant and the employer were in an employee-employer relationship at the relevant times.

B. The claimant provided timely notice of his injuries to the employer.

C. The claimant's claims for compensation were timely filed.

D. The employer filed timely First Reports of Injury with the Department of Labor.

E. The employer filed timely notices of controversion.

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[1] The following references will be used: "TR" for the official hearing transcript; "ALJ EX" for an exhibit offered by this Administrative Law Judge; "CX" for a Claimant's exhibit; "DX" for a Director's exhibit; "IX" for a Carrier's exhibit; and, "EX" for an Employer's exhibit.

[2] The private parties cannot bind the Special Fund absent the Director's agreement to the stipulations. *Brady v. J. Young & Co.*, 17 BRBS 46 (1985), *aff'd on recon.*, 18 BRBS 167 (1985) *cited with approval in Gupton v. Newport News Ship Building and Dry Dock*, 33 BRBS 94 (1999). Stipulations affecting the Special Fund may be accepted if there is evidence of record to support them. *Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000)(proper to accept stipulation involving non-party) *citing McDougal v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in part sub. nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT)((9th Cir. 1993).

F. The claimant's average weekly wage ("AWW"), at the time of the 8/5/1999 injury was $ 412.22 resulting in a compensation rate of $274.81.

G. The Claimant was paid benefits for the 8/5/1999 injury as documented on an LS-208, dated 2/04/2002.

H. The Claimant was not paid benefits for the 8/16/2000 injury.

I. The claimant received temporary total disability benefits from the employer, voluntarily and without an award, at a rate of $ 274.81 per week from 10/06/2000, through 2/12/2001, for a total of $5,103.61, as set forth on the LS-208, dated 2/04/2002.[3]

II. ISSUES

A. Whether the Longshore and Harbor Workers' Compensation Act applies to this claim?

B. Whether the claimant sustained work-related injuries on 8/5/1999 and on 8/16/2000?

C. Whether the injuries occurred in the course and scope of the claimant's employment?

D. Whether the claimant continues to suffer from, and require further medical care and treatment for work-related injuries, impairments or disabilities suffered on August 5, 1999 and on August 16, 2000?

E. Whether the claimant is permanently and partially disabled because of work-related injuries which occurred on August 5, 1999 and on August 16, 2000?

F. Whether the onset date of the claimant's permanent and partial disability is July 23, 2001?

G. Whether the employer should provide such additional medical services as the claimant's condition may require?[4]

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[3] EX 3-1 shows he was paid $274.81 through 2/22/01.

[4] *Ferrari v. San Francisco Stevedoring Co.*, ___ BRBS ___,(BRB No. 99-1032)(June 29, 2000). The issue of employer authorization, under section 7(d), is not automatically raised by making a claim for medical benefits.

III. FINDINGS OF FACT

A. BACKGROUND

The claimant is thirty-three years old with an eleventh-grade education and is a resident of Hertford, North Carolina. He began working for the employer ("Tidewater") in 1998 as a laborer. His duties included loading and unloading the employer's barge with construction equipment and materials. He remains employed at Tidewater. (EX 2). On August 5, 1999, the claimant, while working as a laborer for the employer, which was building a high-rise bridge for automobile traffic over the intercostal waterway, in Fairfield, North Carolina, injured his left knee while jumping from a construction barge to a temporary causeway or bulkhead when he landed on a rope and twisted his leg. He was thereafter treated by Dr. Holden. On August 16, 2000, while working as a mechanic, in Tidewater's yard, on the Elizabeth River, Norfolk, Virginia, jumped off a large excavator or bull dozer he had loaded on a barge, and fell injuring his left knee. He also claimed back injuries related to the August 16, 2000, incident. He was thereafter treated by Dr. Holden. The Claimant subsequently had two surgeries.

B. CLAIMANT'S MEDICAL EVIDENCE

Claimant's Testimony

The Claimant testified about both of his work injuries. After the August 5, 1999, injury he was treated by Dr. Holden, but returned to work because he could not afford to miss it. On August 16, 2000, after injuring his left knee, he informed his supervisor, Mr. Strickland, and his boss, Ron Wood, of the injury. He went to the doctor and returned the next day to finish the excavator job. After the 2000 injury, Dr. Holden performed two surgeries, the first on October 6, 2000, and the last one in 2001. He worked up to the day of his surgery. (EX 2-36). When asked if the surgeries helped, the Claimant testified, "yes and no." He still feels pain and will lose his balance. He treated with Dr. Holden, who was chosen for him by Tidewater, about one year. He tried various drugs and medications for pain relief but without success. On February 12, 2001, Dr. Holden released him to full duties saying there is nothing more that can be done. He was not treated between August 5, 1999 and August 16, 2000. He did not work after the surgery, October 6, 2000, until February 2001 and received workers' compensation. (EX 2-43). He worked about two months prior to his second knee surgery, in April 2001. (EX 2-44). He has not seen Dr. Holden since August 28, 2001 and has not treated with any other doctor since then. (EX 2-49). He would like to see a doctor and his back bothers him from time to time. (EX 2-50).

The Claimant did not mention his back injury on August 16, 2000. The first time he raised the back injury was in February 2001. The Claimant testified at his deposition, that on August 16, 2000, he only hurt his knee and no other part of his body. (EX 2-36). He added that he had never had back problems prior to the knee surgery. (EX 2-38). Dr. Lane, in North Carolina, is his family physician. However, he testified he saw Dr. Price Mounds for his back pain. (EX 2-41). The Claimant testified at his deposition, that his knee hurts "from time to time" and "that's always

going to hurt." (EX 2-43). When asked if it impairs his work ability, he responded, "I do my job." (EX 2-43). However, he added his knee hurts occasionally because of the operation and screws in his leg. It bothers him depressing the clutch in trucks and although no doctor has told him so, he feels he cannot drive. (EX 2-54). That is a reason he no longer drives the lube truck. In May 2002, he was involved in a car accident where he injured his chest. (EX 2-45). As a result, he missed three months work. (EX 2-45). Her testified he is receiving disability from Tidewater while he was off in 2002. (EX 2-46).

Hospital Records

Medical records from Dr. Holden were submitted. (CX 11). They address the Claimant's post-left anterior cruciate ("ACL") reconstruction operative status. In November 2000, they show pain, some burning sensation and cramping in the back of the knee. A December 4, 2000, Progress Report reflects a diagnosis of "ACL, medial maniseus tears (L) knee; S/P ACL reconstruction." The pain and numbness continued. The Claimant continued in rehabilitative therapy in January through February 2001, but the pain, numbness and difficulty walking persisted.

On February 9 and February 12, 2001, he complained of lower right back pain without radiation into his thighs or leg and hip pain which began with a drive to New York for a family emergency. (CX 11-7; CX 11-8). The Claimant reported there was no injury related to the lower back pain. (CX 11-9). X-rays taken February 12, 2001, were normal and "look excellent". (CX 11-9; 11-14). On February 12, 2001, he reported his left knee was doing fine. He had full range of motion and strength of 4.5 to 5. Dr. Holden informed him the back pain was "not related at all to his knee". (CX 11-10). On February 12, 2001, Dr. Holden informed the Claimant he was fit for duty. (CX 11-11). By February 22, 2001, his back was better but troublesome when he stood for long periods. He was allowed to perform full duties. (CX 11-15).

In March and April 2001, the Claimant continued to experience some left knee pain. On March 26, 2001, Dr. Holden noted the Claimant may have some impingement of the left knee and his lower back was 80% improved. (CX 11-17). Dr. Holden "rescoped" the left knee, on April 2, 2001, to determine the source of a "clunking" noise. (CX 11-20). Arthroscopic surgery on April 13, 2001, repaired the impingement from a scar resulting from the earlier left knee surgery. (CX 11-22). Dr. Holden reported the medial meniscus was healed very nicely as was the anterior cruciate ligament. (CX 11-25). In April and May 2001, the Claimant underwent physical therapy for his left knee. By May 29, 2001, he continued to experience left knee pain in cold or rainy weather, numbness. (CX 11-30). Continued physical therapy was ordered. By June 28, 2001, he reported after five hours standing the left knee started to hurt. (CX 11-31). He was prescribed Vicodin for his back. (CX 11-33).

In July 23, 2001, the Claimant reported left knee pain after standing six hours and with twisting or weight bearing. (CX 11-34). Dr. Holden wrote, "I don't think anything will make this man happy." (CX 11-34). He added, "Full duty. There is no disability based on loss of motion or

loss of tissue at the present time." (CX 11-35). He experienced left knee pain in July 2001 when standing six hours or more. On August 28, 2001, he reported he could not climb ladders and had pain and popping in his left knee. (CX 11-37). Dr. Holden found his left knee was absolutely stable with full range of motion and flexion and extension comparable to his right knee. (CX 11-37). No further followup was ordered.

C. EMPLOYER'S MEDICAL EVIDENCE

Treatment Records

On August 16, 2000, Dr. Holden reported evaluating the Claimant's left knee. The Claimant informed the doctor he recalled no specific date of injury but had noticed the pain and swelling three weeks earlier. (EX 1-1; 1-4). He was losing his balance more and more frequently. (EX 2-48). He told the doctor he jumps off large equipment throughout his work day. Although his X-rays were normal, Dr. Holden suspected internal derangement of an old partial ACL tear or an old medial collateral ligament tear. One of the problems could cause a torn meniscus. (EX 1-1). He was released to full duty and an MRI scheduled. The MRI revealed a complete tear of the ACL and meniscus, vertical meniscal tear and degenerative anterior third zone tear of the lateral mensicus. (EX 1-5). The MRI, clinical findings and history were compatible with an old ACL tear. The Claimant underwent arthroscopic repair surgery on October 6, 2000. (EX 1-8 through 1-10). He was entered into physical therapy thereafter. On November 20, 2000, he was returned to restricted duty. (EX 1-13).

IV. CONCLUSIONS OF LAW

An injured person must satisfy four elements in order to receive compensation under the LHWCA. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 45 110 S.Ct. 381, 107 L.Ed.2d 278, 23 BRBS 96 (CRT) (1989). First, the person must be injured in the course of employment. 33 U.S.C. § 902(2). Next, the employer must have employees engaged in maritime employment. 33 U.S.C. § 902(4). Third, the injured person must have "status," that is, be engaged in maritime employment. 33 U.S.C. § 902(3); *Director, OWCP v. Perini N. River Assocs.*, 459 U.S. 297, 317, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). Finally, the injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a). This last element is the "situs" test. *E.g., Schwalb*, 493 U.S. at 45.

It is well established that, in arriving at his or her decision, an Administrative Law Judge is entitled to evaluate the credibility of all witnesses and to draw his or her own inferences and conclusions from the evidence. *Quinones v. H.B. Zachery, Inc.* 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998). Accordingly, the Administrative Law Judge's credibility determinations will not be disturbed unless they are inherently incredible or patently unreasonable. *Id.; Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

It has been consistently held that the Act must be construed liberally in favor of claimants. *Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L. Ed. 5 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

A. JURISDICTION[5]

In order for a claimant to be eligible for benefits, the LHWCA, as it was amended in 1972, required an injured worker to qualify under both a "situs" and a "status" test. *Pfeiffer Co. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed 2d 225, 11 BRBS 320 (1979).

Prior to the 1972 Amendment to the Act, a worker injured upon navigable waters of the United States was covered by the Act without any inquiry into what he was doing at the time of his injury. A longshore or harbor worker injured on the landward side of the dock, however, could not collect LHWCA benefits and was thus left with state workers' compensation benefits as his sole remedy. The 1972 Amendment added the "status" test, extending LHWCA coverage to "maritime employees" who perform their duties on land areas adjoining navigable waters. See 33 U.S.C. § 902(3).

Maritime workers are thus permitted to collect benefits under the LHWCA, even if they are injured on land, so long as they meet the following tests:

> (1) *Status* - the worker must be a maritime employee, such as a longshoreman, shipbuilder, or ship repairman engaged in loading, unloading, constructing, or repairing a vessel of at least eighteen net tons in size. *See* 33 U.S.C. § 902(3); 20 C.F.R. § 702.301(12).
> (2) *Situs* - the worker's injury must occur on navigable waters of the United States, or on a coterminous dry dock, pier, wharf, terminal building, marine railway "or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." *See* 33 U.S.C. § 903(a).

In 1983, the Supreme Court held that Congress had not intended to withdraw any coverage when it passed the 1972 amendment, which added the "status" requirement and expanded the "situs" definition. Therefore, any worker injured on navigable waters could claim under the LHWCA regardless of whether he or she met the statute's "status" requirement of being a "maritime employee." *Director, OWCP v. Perini N. River Assoc.*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465, [15 BRBS 62(CRT)](1983); *see also Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999)(*en banc*). Thus, if a worker is injured on a navigable water situs, he need only show that he works for a maritime employer in order to be eligible for LHWCA benefits.

If the same worker is injured, instead, on an adjoining dock, pier, wharf, dry dock or

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[5] Law of the Circuit in which injury occurs is applicable. *Roberts v. Custom Ship Interiors*, ___ BRBS ____ (May 15, 2001)(BRB No. 00-832). The Board and Ninth Circuit have distinguished "jurisdiction" from "coverage" of the Act. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 90 (1989) and *Perkins v. Marine Terminals, Corp.*, 673 F.2d 1097, 1100 (9th Cir. 1982)("Situs" question goes only to "coverage" not subject matter jurisdiction).

loading area, he must also prove that his particular job is of a "traditionally maritime" status, or connected to ship-loading[6], ship building, ship repairing, etc., to claim LHWCA eligibility. *See Texports Stevedore Co. v. Winchester*, 554 F.2d 245, 6 BRBS 265, *aff'd on reh'g en banc*, 632 F.2d 504, [12 BRBS 719] (5th Cir. 1980)*(en banc), cert. den.* 452 U.S. 905 (1981)("adjoining area" should focus on functional relationship or nexus between "adjoining area" and maritime activity on navigable waters); *Olson v. Healy Tibbits Construction Co.*, 22 BRBS 221 (1989); *Arjona v Interport Maintenance Co., Inc.*, 31 BRBS 86 (1997); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978); and, *Waugh v. Matt's Enterprises, Inc.*, ___ BRBS ___, BRB No. 98-0735 (Feb. 23, 1999)(applies *Brady-Hamilton* functional relationship test).[7] An adjoining area must have a maritime use, but need not be used exclusively or primarily for maritime purposes. *Texports*, supra; *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) at 4; *Bianco v. Georgia Pacific Corp.*, 35 BRBS 99 (2001).

An "area" is not limited to the pin-point site of the injury; rather determination of whether an area is a covered situs requires an examination of both the site of the injury and the surrounding area, and the character of surrounding properties is but one factor to be considered. *Bianco v. Georgia Pacific Corp.*, 35 BRBS 99 (2001). Both the Benefits Review Board (BRB) and the courts have held that "adjoining areas" need not be contiguous to navigable waters, nor a prescribed distance from the water's edge.[8] *See Palmer Delta Marine Industries*, 12 BRBS 957 (1980); *Texports, supra*, and *Zeringue v. McDermott, Inc.*, 32 BRBS 75, BRB No. 98-435 (Dec. 8, 1998)(sites "customarily used for significant maritime purposes").[9] But see *McCormick v. Newport News Ship Building and Dry Dock Co.*, 32 BRBS 207 (1998)(arising in 4th Cir.) and *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134 (4th Cir. 1995) *cert. den.* 116 S.Ct. 2570 (1996)(an area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters).

Under the "status" test of Section 2(3), coverage under the LHWCA is restricted to those "engaged in maritime employment." The "status" test is independent of the "situs" test. *McCray*

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[6] See *Bianco v. Georgia Pacific Corp.*, 35 BRBS 99 (2001) and *generally Garmon v. Aluminum Co. of America-Mobile Works*, 28 BRBS 46, 49 n. 2 (1994), *aff'd on recon..*, 29BRBS 15 (1995) regarding "unloading."

[7] See *Sowers v. Metro Machine Corp.*, 35 BRBS 154 (2001), __ BRBS ___, (BRB No. 00-1141)(Jan. 3, 2002)(*en banc*)(facility used to fabricate vessel components failed to meet "situs" requirement despite fact ship repair was its *raison d'etre*) for discussion of Fourth Circuit's *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT)(4th Cir. 1998), *cert. den.*, 525 U.S. 1040 (1998)(contiguity of steel fabrication plant (1/3d fabricating steel for maritime use) with dock to navigable waters only fortuitous thus situs test not met).

[8] *See, Arjona v. Interport Maintenance Co., Inc.*, 31 BRBS 86 (BRB No. 99-0573)(Mar. 1, 2000) for a review of the law in this area. *See also Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (BRB No. 00-583)(February 13, 2001).

[9] *See, Uresti v. Port Container Industries, Inc.*, ___ BRBS ____ (BRB No. 99-432)(Aug. 21, 2000)(arising in 5th Cir.) Regarding "customary use". *See also, Nixson v. Mobile Mining & Minerals*, ___ F.3d ___ (Case No. 99-60273)(5th Cir., Feb. 7, 2000), *aff'g* BRB No. 98-988 (March 2, 1999), *pet. for cert. filed*, No. 00-44 (July 6, 2000). See *Jones v. Aluminum Co. of America [Jones II]*, 35 BRBS 37 (2001), citing *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998), for discussion of the "function" of the adjoining area.

Construction Co. v. Director, OWCP, 181 F.3d 1008, 33 BRBS 81 (CRT)(9th Cir. 1999). This test is satisfied if the claimant's duties are "an integral part" of the longshoring, shipbuilding or ship repair process.[10] *Northwest Marine Terminals v. Caputo*, 432 U.S. 248, 97 S.Ct. 2348, 53 L.Ed. 2d 320, [6 BRBS 150] (1977). The courts are required to look beyond the claimant's job title since it is the function and nature of the duties which determine status. *Caputo, supra; Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 [5 BRBS 393] (3d Cir. 1977); *Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (BRB No. 00-0928B)(July 11, 2001)(Examine nature of the work not the employer's name, i.e., a casino). "First, the work must be 'maritime' for the person to be an 'employee." *McCray*, 33 BRBS at 83.[11] In order for one's job to meet the status test, the duties for the employer must be a "necessary link in the chain of work that resulted in ships being built and repaired." *Graziano v. General Dynamics*, 663 F.2d 340 [14 BRBS 52] (1st Cir. 1981), *rev'g* 13 BRBS 16 (1980); *Jackson v. Atlantic Container*, 15 BRBS 473 (1983).

The Supreme Court has also held that coverage extends to workers, who although not actually loading and unloading vessels, are involved in the intermediate steps of moving cargo between ship and land transportation. *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 62 L. Ed. 2d 225, 100 S.Ct. 328 [11 BRBS 320] (1979); *see also Chesapeake & Ohio Ry. Co. v. Schwalb*, 439 U.S. 40, [23 BRBS 96(CRT)] (1989); *Gonzalez v. Merchants Building Maintenance*, ___ BRBS ___, BRB No. 98-1633 (Sept. 21, 1999)(*Schwalb* test not met); and, *McKenzie v. Crowley American Transport, Inc*., 36 BRBS 41 (BRB No. 01-0565)(April 3, 2002)(A trucker whose primary job was moving cargo, in containers and trailers, between a holding area at the port and a rail yard outside the port was not covered).

A maritime employee claimant need not be actually engaged in maritime employment at the time of the relevant injury. *Caputo, supra*. Since *Caputo*, it is well settled that an employee who regularly performs duties relating to maritime employment should not be denied coverage if injured while temporarily performing some non-maritime activity. *Ljubic v. United Food Processors*, 30 BRBS 143 (1996). The Board has held that an employee satisfies the status requirement if he spends "a [*sic*] substantial part of his employment in indisputably maritime activity." *Howard v. Rebel Well Service*, 11 BRBS 568 (1979) *rev'd*, 632 F.2d 1348, [12 BRBS 734] (5th Cir. 1980); *Riggio v. Maher Terminals*, 35 BRBS 104, (BRB No. 00-960)(June 28,

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[10] So, in *Kilburn v. Colonial Sugars*, 32 BRBS 3 (1998), the claimant's momentary or incidental maritime work outside the normal course of his non-maritime job was insufficient to confer status. Although an employee is covered if some portion of his activities constitute covered employment, those activities must be more than episodic, momentary or incidental to non-maritime work.. *Riggio v. Maher Terminals, Inc*., 35 BRBS 104 (2001) citing *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. den*., 452 U.S. 915 (1981) and *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101(CRT)(11th Cir. 1990).

[11] See *Chesapeake & Ohio Ry. Co. v. Schwalb*, 439 U.S. 40, 46, 110 S.Ct. 381, 107 L.Ed.2d 278, 23 BRBS 96(CRT)(1989) and *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56 at 67, 25 BRBS 112 (CRT)(3d Cir. 1992) at 121, for definition of "maritime". See *Moon v. Tidewater Construction Co.*, 35 BRBS 151 (2001) at152-3 (carpenter lacked status) and *Lloyd v. RAM Industries, Inc*., 35 BRBS 143 (2001) at147 n. 6, for definition of "harbor worker," i.e., "at least those persons directly involved in the construction, repair, alteration, maintenance, of harbor facilities (which include docks, piers, wharves, and adjacent areas used in the loading, unloading, repair or construction of ships." *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2002)(Shipyard machine shop cleaner had status as maritime employee).

2001)(discussion of occupational focus of claimant's overall employment versus defunct "moment of injury" theory). *See also Bienvenu v. Texaco, Inc*., 164 F.3d. 901, 32 BRBS 217(CRT)(5th Cir. 1999)(*en banc*)(not an "insubstantial amount" of one's work on navigable waters) *overruling Randall v. Chevron U.S.A., Inc*., 13 F.3d 888 (5th Cir. 1994).[12] *But see contra McCray Construction Co. v. Director, OWCP*, ___F.3d ___, 33 BRBS 81 (CRT)(9th Cir. 1999)(Relying on *Harbor Tug & Barge v. Papai*, 520 U.S. 548, 117 S.Ct. 1535, 137 L.Ed 800 (1997), the Court held a claimant lacked status when although a lifetime maritime worker he was not performing maritime work at the time of his injury, but rather working on a pier not used to serve ships).

1999 Injury

It is undisputed that the Claimant's employer had contracted to construct a high-rise bridge to replace a swing-bridge over the Intercoastal Waterway ("ICW"), in Fairfield, North Carolina. The Intercoastal Waterway is indisputably navigable water. At the time, the Claimant was working as a laborer.

The old, wooden, swing bridge could handle only one lane of vehicular traffic. Vessels on the ICW would have to wait and could not pass when the old swing bridge was open to vehicular traffic. The new high-rise bridge could carry two lanes of vehicular traffic and since it was a high-rise bridge vessels' passage beneath it was completely unimpeded.

In building the high-rise bridge, Tidewater utilized cranes which were moved across the ICW on a barge as needed. Since the area for construction of the new bridge adjacent to the ICW was in a swamp, Tidewater built temporary bulkheads on either side of the ICW in order to load and unload the cranes and construction materials on or from barges. Steel girders for the project were brought in by barge and off-loaded by a crane on a barge to trucks stationed at the causeway or bulkhead. The girders were then lifted and set using a land-based crane. The ICW was about 250-300 feet wide in the area of the bridge construction. Tidewater did not widen the ICW channel. In addition to constructing the new bridge, Tidewater lengthened the roadways approaching the bridge on both ends. The barge had no independent means of propulsion and had been towed to the building site on the ICW.

At the time of his injury, the Claimant was working, as a laborer, on the barge where the crane was unloading girders from a rig to a truck to be set in place. The crane was built into the barge and sometimes called a "rig". He spent most of his time on the rig or barge. His duties involved helping pile driving crews, moving piles, unloading piles, "rigging up girders", "walking girders", putting cable out, and just about anything that had to be done, including tying the barge to the land. The barge moved from the north to the south side of the ICW by means of cables. At

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[12] *See, Ezell v. Direct Labor*, __ BRBS ___ (BRB Nos. 98-0826, 98-0826A, and 98-0826B)(Mar. 8, 1999)(transiently and fortuitously on navigable water?). *Christensen v. Georgia Pacific Corp*., ___ F.3d ___ (No. 00-35922)(9th Cir. Feb. 1, 2002)(Coverage does not depend upon the task which the employee was performing at the moment of injury).

the time of the incident, Mr. Hathaway, the Claimant's supervisor, called for him. The Claimant was not unloading or loading the barge at the time. Hathaway wanted him to "dock the rig off" or secure the barge to the land with ropes. (EX 2-21). The Claimant jumped or stepped 3-4 feet from the barge to the adjoining temporary bulkhead or causeway and hit a rope as he fell or stumbled upon landing injuring his left knee. The bulkhead was constructed to ease loading and unloading of the barges and to "walk" the cranes through the swamp. The Claimant did not seek medical attention and completed his shift. The next day when he considered seeking medical attention, he did not wish to drive himself to see a doctor for five or ten cents per mile. Thus, he was not treated or examined for the matter until August 16, 2000. (EX 2-24). The left knee pain resolved about one and one half months later. (EX 2-24 through 25). Tidewater accepted liability under North Carolina workers' compensation law. A co-worker, Ray Hall, observed the incident. (EX 2-23). In October 2000, the Claimant was transferred off the bridge project and became a mechanic at Tidewater's yard in Norfolk, Virginia, being paid one dollar more per hour. (EX 2-27).

2000 Injury

On August 16, 2000, the Claimant was working as a mechanic in Tidewater's Norfolk, Virginia, Tidewater Equipment Construction Yard adjacent to the southern branch of the Elizabeth River. The Southern Branch Yard is directly next to the Tidewater Equipment Construction Yard, a barge-building facility. (CX 1-8, 1-10). Tidewater has several facilities located in the yard with barges. (TR 22). The Elizabeth River is indisputably navigable water. Tug boats, barges, and floating cranes all dock there at the employer's bulkhead. The employer used tug boats to tow the loaded barges to work sites. The Claimant's duties included loading and unloading equipment and supplies. He mostly drove the "lube" truck. He would also go to various sites and service equipment associated with building bridges and piers. His duties included directly loading and unloading equipment from barges tied to the adjacent bulkhead or dock. (TR 27).

On August 16, 2000, Mr. Farquhanson was assembling the parts of a large bull dozer or excavator, with a land-based crane ten feet from the water, which he was to load or drive onto a barge. It had been trucked-in, in parts, requiring assembly. The excavator ran on tracks on the barge and would later be unloaded from the barge to be used to move gravel and rock on a construction project, the Poplar Island restoration project. (CX 1-22). The project was to protect erosion at the bay. The barge was tied to the bulkhead or dock. The barges are used to carry equipment and must be towed by tugs. The barges are loaded and unloaded on a daily basis. Once he had assembled the bull dozer, the Claimant drove it aboard the barge. (TR 23). The dozer lacked a ladder, so the Claimant jumped down from it.[13] He fell on his left knee injuring or

[13] In his August 2, 2002 deposition, the Claimant testified that he jumped off the crane used to assemble the excavator rather than the excavator itself. (EX 2-31).

re-aggravating it.[14] The Claimant testified that his supervisor, Hank Strickland, saw him limping. (EX 2-32). The Claimant informed his supervisor, Mr. Ronald Wood, the field equipment service supervisor, about the injury the next day. According to Mr. Wood, there were no witnesses to the accident.

Tidewater is a construction company. From the testimony, I gather it has special expertise with respect to waterfront or over-the-water construction. It uses the yard in which the Claimant was working to build barges and fabricate work projects, but it is otherwise not engaged in ship building or repair, nor is it engaged in the traditional maritime transportation of cargo. However, it does move its construction equipment and materials about on barges on navigable waterways. The barges must be towed to construction sites. The construction equipment sits atop or on the barges and is used to move or lift construction materials and supplies. The construction materials must be loaded and unloaded from the barges.

The Claimant was a laborer until 2000 when he became a mechanic. Even at that point, his duties included loading and unloading Tidewater's construction equipment from barges. His job thus required him to be both on and off the barges and both on and off the navigable waters. Thus, he is unlike workers whose job is entirely land-based but who merely take a boat ride. Nor did he qualify as a "seaman", in any manner. There is no evidence the barges had "crews" or crew facilities.

The Claimant's duties are not far afield of the construction worker's duties in *Perini*, *supra*. There a construction worker was injured while performing his job on the deck of a cargo barge being used in the construction of a sewage treatment plant extending over the Hudson River. The Court observed Perini was an employee of a statutory employer, stating, "We consider these employees to be 'engaged in maritime employment' not simply because they are injured in a historical maritime locale, but because they are required to perform their duties upon navigable waters."[15] *Id* at 342. *See also Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225 (1942), where the Court, in dicta, indicated that a worker engaged in dismantling a bridge across a navigable river who fell from a barge and drowned could be covered under the LHWCA.

There are numerous cases dealing with bridge building. In *Le Melle v. B.F. Diamond Construction Co.*, 674 F.2d 296 (4th Cir. 1982) *cert. den.*, 459 U.S. 1177 (1983), a construction worker, i.e., "concrete finisher", employed in the building of a bridge over navigable water was granted "status" under the LHWCA. The Court found the bridge was designed in part as a aid to

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[14] At his deposition, the Claimant testified that he started noticing the left knee about then, he did not have a specific date for the injury, and that he had been trying to "stick it out." (EX 2-35).

[15] In *Griffen v. McClean Contracting Co.*, (BRB No. 96-0759)(Jan. 29, 1997), referring to *Perini*, the Board observed that, "Regardless of the nature of the work being performed, such a claimant satisfies both the situs and status requirements and is covered by the Act, unless he is specifically excluded from coverage by another statutory provision."

navigation.[16] In disagreeing with the Board's opinion that bridges, even over navigable waters, were unrelated to maritime commerce, the Court observed that prior to the 1972 amendments bridge workers employed over navigable waters were covered and that:

> although bridge demolition and construction is not classically maritime work under the 'ancient traditions of the sea', it has long been merged with such work by the exigencies of modern coastal land and sea traffic."

Id at 298. The Court found the bridge helped both maritime and vehicular traffic.

In *Crapazano v. Rice Mohawk, U.S. Construction Ltd*, 30 BRBS 81 (1996), a journeyman iron worker constructing a bridge across a bay was injured while walking along the girders on the bridge structure. There was no showing the bridge was used for maritime purposes because there was no evidence it aided in navigation. The employee's duties included unloading a barge by hooking pre-cut concrete girders to the crane, climbing the bridge structure, and loading the girders onto pile caps, positioning reinforced beams, and bolting clips onto the girders and beams. The Board found since the Claimant's unloading materials from the barge were for purposes of building a non-maritime structure over water, his employment had no relationship to maritime commerce under the law of the Second Circuit, unlike some other circuits. Importantly, the Board had relied upon a pre-1972 Supreme Court case holding bridges are not covered situs, as a matter of law. Unlike the "non-covered" welder in *Herb's Welding Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985), the Claimant here had duties loading and unloading the employer's barges, although, like the "non-covered" iron worker in *Crapazano* and the "covered" construction-site foreman, in *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54 (1981), those materials were for purposes of building a non-maritime structure over water. Like the "covered" mechanic, in *Randall v. Chevron U.S.A.*, 13 F.3d 888 (5th Cir 1994), the Claimant was injured while attempting to return to shore, but more significantly to dock the barge.

In *Pulkoski v. Hendrickson*, 28 BRBS 298 (1994), the Board observed the claimant's employment had not aided navigation, but hindered it since the canal became less navigable due to the lower clearance of the bridge. Moreover, the bridge construction worker's duties there, unlike this case, did not bear a relationship to loading, unloading, etc. of a vessel.

In the present case, although the primary purpose of the new high-rise bridge was disputed, the evidence establishes it facilitated both vehicular roadway traffic and vessel traffic on the ICW. Under the old swing bridge routine, boats had to wait for it to open and/or radio ahead for it to open in order for them to pass. Likewise, vehicles had to wait while the sawing bridge was open for water traffic. With the high-rise bridge, neither vessels not vehicular traffic had to wait.

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[16] The employer had stipulated the employee had met the "situs" requirement because it thought the employee was standing on a bridge piling at the time of the injury. The recited facts supported the stipulation as to situs.

The Claimant's work here, in 1999, involved loading and unloading construction materials to build the high-rise bridge. At the time of the injury he had been unloading girders. Unlike some of the workers found not "covered" in earlier cases, he was a laborer with no special land-based expertise of record. In the process of returning to shore, i.e., jumping, he was injured when he fell on a rope. His purpose was to tie off or dock the barge. At least in the Fourth Circuit, the courts may find bridges of this nature assist in maritime commerce. Following *Le Melle*, I find the Claimant meets both the situs and status tests and is covered by the Act in relation to his 1999 injury, and that Tidewater is thus a maritime employer.

With respect to the 2000 injury on the barge, as the Court observed, in *Randall v. Chevron U.S.A.*, 13 F.3d 888 at 896 (5th Cir. 1994), *Perini* created "a special 'status' test appl(ying) to workers who are injured while upon actual navigable waters in the course of his employment upon those waters." So, if the claimant was on the barge at the time of his injury, as he often was, he would be covered. If on the adjacent maritime facility, an area at the water's edge, his activities were at a site particularly suited for maritime uses and significantly devoted to such maritime uses, he was likewise covered.

The claimant was responsible for loading the employer's construction equipment on barges tied to the adjacent bulkhead or dock which were then towed to waterfront construction sites. The employer's business had the need to assemble and then load large equipment, trucked in to the employer's yard, adjacent to the Elizabeth River, a navigable waterway. Thus, unlike the employer in *Brickhouse v. Jonathan*, *supra*, Tidewater's presence adjacent to the Elizabeth River was not merely "fortuitous"; a river-front facility was required (its raison d'etre) for it to perform its business. Mr. Farquhanson was only ten feet from the water's edge assembling the excavator which he was subsequently required to load on a barge. He also left the assembly area to perform other duties including loading and unloading barges. The claimant's work area was contiguous with and touched the navigable waters. *Sidwell v. Express Container Services*, 71 F.3d 1137 (4th Cir. 1995).

I find that the claimant's employment as a mechanic, with the Employer, a maritime employer, constitutes qualifying maritime employment and that his work, on the barge at the time of the injury, in Norfolk, Virginia, at Tidewater's yard on the Elizabeth River, which constitutes "navigable waters"satisfies the "situs" requirement. Thus, I find jurisdiction, under the Act.

RESPONSIBLE EMPLOYER

For a claim to be compensable, under the Act, the injury must arise out of and in the course of employment. 33 U.S.C. § 902(2). Therefore, an employer-employee relationship must exist at the time of the injury. *American Stevedoring Limited v. Marinelli*, ___ F.3d ___, No. 00-4180, 35 BRBS 41(CRT)(2d Cir. 2001) *citing Fitzgerald v. Stevedoring Services of America*, BRB No. 00-0724, 2001 WL 94757, at 4 (2001)(*en banc*). Under the Act, an "employee" is defined as "any person engaged in maritime employment" and "employer" is defined as "an employer of any of whose employees are employed in maritime employment." 33 U.S.C. §

902(3), 902(4). The Board has applied three tests to determine if such a relationship exists: (1) the relative nature of the work (i.e., the nature of the claimant's work and its relation to the employer's regular business); (2) the right to control the details of the work; and, (3) Restatement (Second) of Agency, Section 220, subsection 2, which encompasses factors set forth in each of the other two tests. A judge must apply whichever test is best suited to the facts of the particular case. *Marinelli*. Since the claimant's disabling injuries occurred while he was employed by Tidewater, in August 1999 and in August 2000, the named employer is the responsible employer.

TIMELINESS OF NOTICE

Section 912 sets out the requirements for timely notice to an employer of injury or death. 33 U.S.C. § 912. The parties have agreed and I find the timely notice of the injury.

TIMELINESS OF CLAIM

The parties have agreed and I find the claimant timely filed his claim. A worker must file an LHWCA claim within one year after the injury. 33 U.S.C.A. § 913(a); 20 C.F.R. § 702.221.

INJURY

Section 2(2) of the LHWCA defines an "injury" as an accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. 33 U.S.C. § 902(2)*; see U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor*, 455 U.S. 608, 102 S.Ct. 1312 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980).

The claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish his prima facie case.[17] *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495, [14 BRBS 631](1982); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11 (1998)(claimant need not prove impairment was "work-related" at this juncture only that conditions existed which could have caused it). An injury need not involve an unusual strain or stress; it makes no difference that the injury might have occurred wherever the employee may have been. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Glens Falls Indemnity co. v. Henderson*, 212 F.2d 617 (5th Cir. 1954). The claimant must establish each element of his prima facie case by affirmative proof. *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989);

[17] Or, as the Board stated in *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984), that the claimant has the burden of establishing: (1) he or she sustained physical harm or pain; and, (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. But, a connection between the work and the harm need not be established at this stage. *Accord, Kelaita*, 13 BRBS at 331.

see also Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 2d 221, 28 BRBS 43(CRT)(1994).

Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. *Bath Iron Works Corp. v. White*, 584 F.2d 569 (1st Cir. 1978).

Once the prima facie case is established, a presumption is created under Section 20(a) of the LHWCA that the employee's injury arose out of his or her employment.[18] 33 U.S.C. § 920(a). Moreover, Section 20(d) of the Act favors the claimant with a presumption that the injury suffered was not occasioned by the willful intention of the injured employee to injure or kill himself or another. *Green v. Atlantic & Gulf Stevedores, Inc.*, 18 BRBS 116 (1986).[19]

Once the presumption is invoked, the party opposing entitlement must present specific and comprehensive medical evidence proving the absence of or severing the (presumed) causal connection between such harm and employment or working conditions. *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *Conoco, Inc. v. Director, OWCP*, 33 BRBS 187 (CRT)(5th Cir. 1999); *Parsons Corp. of Cal. v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980).[20] If an employer does not offer substantial evidence to rebut the presumption, the presumption provided by section 20(a) will entitle the claimant to compensation.[21] *See Del Vecchio v. Bowers*, 296 U.S. 280, 284-285, 102 S.Ct. 1312, 71 L.Ed.2d 495 (1935); *Universal Maritime Corp. v. Moore & Director, OWCP*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999).[22]

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[18] This presumption applies only to the issue of whether an injury arises in the course of employment and, thus, is work-related; not to the issues of the nature and extent of disability. *Carlisle v. Bunge Corp.*, 33 BRBS 133, BRB No. 98-1604 (Sept. 13, 1999) *citing Jones v. Genco, Inc.*, 21 BRBS 12 (1998).

[19] *See Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998), regarding the relationship between section 3(c) and the section 20(a) presumption.

[20] In *Conoco*, the Fifth Circuit held a standard requiring an employer to "rule out" the possibility of a causal relationship between a workplace injury and the claimant's employment was too high a standard to place on employer to rebut the 920(a) presumption. In *American Grain Trimmers, Inc. v. Director, OWCP [Janich]*, __ F.3d ___, 33 BRBS 71(CRT)(7th Cir. 1999), cert. den. ___ U.S. ___ (S.Ct. No. 99-696, Feb. 28, 2000), the Seventh Circuit iterated the employer's burden is one of "production" only.

[21] While "substantial evidence requires 'more than a mere scintilla,' it is only 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 410, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); *see Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982).

[22] In *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995), the Board held even where the record contains no medical evidence establishing causation, the claimant prevails unless the employer submits evidence sufficient to break the causal nexus.

The employer must rebut the presumption with substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Quinones v. H.B. Zachery*, 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996). Where aggravation of a pre-existing condition is at issue, the employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury.[23] *Quinones, supra; Cairns v. Matson Terminals*, 21 BRBS 252 (1988); *Zea v. West State, Inc.*, ___ BRBS ___, BRB No. 97-931 (April 9, 1998).[24] In establishing rebuttal of the presumption, however, proof of another agency of causation is not necessary. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982)(Kalaris, J., concurring & dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. den.*, 467 U.S. 1243 (1984). The testimony of a physician that no relationship exists between an injury and the claimant's employment is sufficient to rebut the presumption. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

If the Administrative Law Judge finds the presumption is rebutted, it no longer controls and he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Devine v. Atlantic Container Lines, G.T.E.*, 25 BRBS 15 (1991). When the evidence as a whole is considered, it is the proponent (claimant) who has the burden of proof. *See, Director, OWCP v. Greenwhich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221, [28 BRBS 43(CRT)(1994)].

In the case *sub judice*, the claimant has alleged that the harm to his body, i.e., his left knee and lower back, resulted from the August 5, 1999 and August 16, 2000 accidents at the employer's bridge-building site and at its shipyard. With the exception of Dr. Holden's report that the lower back problem is unrelated to the knee injury or surgery, the employer has introduced no evidence severing the connection between the harm and the claimant's maritime employment. A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub. nom., Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). Thus, the claimant has established a prima facie claim that the harm suffered with respect to his left knee is a work-related injury. However, Dr. Holden's opinion not only rebuts the presumption with regard to his alleged back injury, but establishes it was not caused or aggravated by his employment.

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[23] In *Fargo v. Campbell Industries*, 9 BRBS 766 (1978), the Board affirmed an award of permanent total disability benefits, stating the aggravation of a pre-existing arthritic condition by a work-related injury was completely compensable under the LHWCA. In *Plappert v. Marine Corps. Exchange*, 31 BRBS 13 (1997), the Board held the § 20(a) presumption rebutted where the claimant's disabling condition was caused by a subsequent, non-work related event.

[24] *Zea* also held lay evidence is not sufficient to establish an aggravation.

Aggravation of a pre-existing condition

A work-related aggravation of a pre-existing condition is an "injury" pursuant to Section 2(2) of the Act.[25] *Gardner v. Bath Iron Works Corporation*, 11 BRBS 556 (1979), *aff'd sub nom., Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981); *Preziosi v. Controlled Industries*, 22 BRBS 468 (1989); *Januszewicz v. Sun Shipbuilding and Dry Dock Company*, 22 BRBS 376 (1989) (*Decision and Order on Remand*); *Johnson v. Ingalls Shipbuilding*, 22 BRBS 160 (1989); *Madrid v. Coast Marine Construction*, 22 BRBS 148 (1989).

Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if the employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986)(*en banc*); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998)(hearing loss).

So, when a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, an employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury.[26] *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Mijangos, supra; Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981). The section 20(a) presumption applies to the issue of whether the injury or disability is work-related. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995)(pre-existing injury). To rebut the presumption the employer must produce specific and comprehensive evidence that the Claimant's condition was not caused, aggravated, or contributed to by the work accident.[27] *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), cert. den., 429 U.S. 820 (1976). However, rebuttal of the presumption does not require proof of another agency of causation. *O'Kelley v. Dept. of the Army/NAF*, ___ BRBS ___, BRB No. 99-0810 (May 2, 2000).

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[25] The term "injury" includes the aggravation of a pre-existing non-work-related condition or the combination of work-related and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Care v. WMATA*, 21 BRBS 248 (1988).

[26] In *Grumbley v. Eastern Associated Terminals Co.*, 9 BRBS 650 (1979), the Board reversed an award for additional benefits where the claimant, who had a work-related injury to his knee, fell from his home's roof when repairing an antenna after the injured knee collapsed on him. The Board held, under Section 2(2) of the Act, to be compensable the second injury must be related to the original injury. The judge must determine whether the second injury resulted naturally or unavoidably. A claimant must show a degree of due care in regard to his injury.

[27] If the presumption is rebutted, it falls out of the case and the claimant must establish a causal relationship based on the record as a whole. *Universal Maritime Corp. v. Moore*, 126 F.3d 256 (4th Cir. 1997).

The Claimant has established that he injured his left knee, as he described, on August 5, 1999, jumping from the barge to the bulkhead. The Employer's evidence does not refute that. Likewise, the Claimant has established he re-aggravated his left knee injury on or about August 16, 2000, jumping to the ground. The Employer's evidence does not refute that.

I therefore conclude that the claimant has met his burden of proving the existence of an injury or harm and that work-related accidents occurred or that working conditions existed which could have caused the harm. The employer has not presented substantial evidence which establishes rebuttal of the presumption, under Section 20(a) that the injuries arose out of the claimant's employment. Nor has the Employer produced specific and comprehensive evidence that the Claimant's condition, of August 16, 2000, was not caused, aggravated, or contributed to by the work injury of August 5, 1999.

DISABILITY

Section 2(10) of the LHWCA defines "disability" as the incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.[28] 33 U.S.C. § 902(10); *see also, Metro Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 127 (1997). In order for a claimant to receive disability benefits, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Services of America*, 25 B.R.B.S. 100, 110 (1991); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Owens v. Traynor*, 274 F. Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. *American Mutual Insurance Company of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (*Id*. at 1266).

The claimant bears the initial burden of establishing the nature and extent of any disability sustained as a result of a work-related injury without the benefit of the Section 20 presumption. *Lombardi v. Universal Maritime Service*, 32 BRBS 83 (1998); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); and, *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once the claimant has established that he is unable to return to his former employment because of a work-

[28] A disability determination turns on the claimant's capacity for work rather than her actual employment status. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *Newport news Shipbuilding and Dry Dock Company v. Director, OWCP [Wiggins]*, No. 00-2532 (4th Cir. December 14, 2001)(Unreported). Although such an award is the exception, a claimant may still be entitled to permanent and total disability benefits following a period of employment. See, *e.g., Haughton Elevator Co. v. Lewis*, 572 F.2d 447 (4th Cir. 1978) (claimant worked in spite of excruciating pain); *Paul v. General Dynamics Corp*., 13 BRBS 1073 (1981) (claimant's employment only possible due to extraordinary effort); *Walker v. Pacific Architects & Engineers Inc*., 1 BRBS 145 (1974) (claimant's employment due merely to employer's benevolence).

related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Air America v. Director*, 597 F.2d 773 (1st Cir. 1979); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984).

1. EXTENT OF DISABILITY - TOTAL vs. PARTIAL

A claimant has the burden of proving a *prima facie* case of total disability by showing he cannot return to his regular employment due to a work-related injury.[29] *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). At the initial stage, a claimant need not establish he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988)(due to permanent restrictions against heavy lifting and excessive bending, employee could not resume usual job as sandblaster).

The Judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). In doing so, an Administrative Law Judge is not bound to accept the opinion of any particular witness but rather, is entitled to weigh the credibility of all witness, including doctors, and draw his own inferences from the evidence. *Lombardi v. Universal Maritime Service*, 32 BRBS 83 (1998). The Board held, in *Lombardi*, that the credited medical opinion of a claimant's treating orthopedic surgeon, in connection with the claimant's testimony regarding his job requirements, constituted substantial evidence in support of a determination that the claimant's impairment prevented him from performing his usual employment duties. *Id*.

Here, while the Claimant testified that his left knee occasionally hurts and that he has difficulty climbing ladders and depressing the clutch of the trucks at work and that is one of the reasons he no longer drives the lube truck, Dr. Holden, who presented the only medical evidence, had long before released him from any work restrictions. Moreover, the Claimant not only has not sought medical treatment since last seeing Dr. Holden, in August 2001, he continues to work for Tidewater as a mechanic, the same job he had in August 2000. According to Dr. Holden, the two knee surgeries were successful.

A claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Richardson v. Safeway Stores*, 14 BRBS 855 (1982); *Miranda v. Excavation Construction*, 13 BRBS 882, 884 (1981). However, a

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[29] Even if able to work, one may be found totally disabled if working with extraordinary effort and in excruciating pain. *See Argonaut Ins. Co. v. Patterson*, 846 F.2d 715 (11th Cir. 1988) and *Louisiana Insurance Guaranty Association v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); and *Newport news Shipbuilding and Dry Dock Company v. Director, OWCP [Wiggins]*, No. 00-2532 (4th Cir. December 14, 2001)(Unreported).

judge may find an employee able to do his ususal work despite complaints of pain, numbness, and weakness, when a physician finds no functional impairment. *Peterson v. Washington Metro Area Transit Authority*, 13 BRBS 891 (1981). In this case, it is not proven that the Claimant cannot perform his regular job due to periodic pain or weakness. The evidence does not establish excruciating or disabling pain.

On the basis of the record provided, I conclude that the claimant has not established that he cannot presently return to work as a mechanic due to the left knee injuries suffered on August 5, 1999 and August 16, 2000. However, the Claimant and Employer have agreed and I find that he suffered a temporary total disability between the date of his first operation, October 2000 and February 12, 2001, when he returned to work with Tidewater. The Claimant did not and could not work during that period.

The Board and those circuits which have spoken on the issue are in agreement that total disability becomes partial on the earliest date that the employer establishes suitable alternate employment. *See Darden v. Newport News Shipbuilding and Dry Dock Co.*, 18 BRBS 224 (1986). Since the Claimant returned to work at Tidewater, on February 13, 2001, his disability became partial on that date. I credit his testimony that he continues to experience pain in his left knee, particularly on cold or rainy days, and that he has difficulty climbing ladders and depressing truck clutches.

2. NATURE OF DISABILITY - PERMANENT vs. TEMPORARY

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *General Dynamics Corporation v. Benefits Review Board*, 565 F.2d 208 (2d Cir. 1977); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding and Construction Company*, 17 BRBS 56 (1985); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984).

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." An injured worker's impairment may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of "maximum medical improvement" or "MMI."[30] *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *see SGS Control Services v. Director, OWCP*, 86 F.3d 438, 443-44 (5th Cir. 1996);

[30] If a claimant shows he is disabled under the Act and MMI has not been reached, the appropriate remedy is an award of temporary total or partial disability, under Section 8(b) or (e). *Carlisle v. Bunge Corp.*, 33 BRBS 133, BRB No. 98-1604 (Sept. 13, 1999) *n. 10, citing* 33 U.S.C. § 908(b) and *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

Director, OWCP, v. Berkstresser, 921 F.2d 306, 312 (D.C. Cir. 1991). Any disability before reaching MMI would be temporary in nature. *Id*.

The determination of when maximum medical improvement is reached, so that a claimant's disability may be said to be "permanent," is primarily a question of fact based on medical evidence. *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988); *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); *Eckley v. Fibrex and Shipping Company*, 21 BRBS 120 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition becomes permanent is primarily a medical determination, regardless of economic or vocational considerations. *Manson v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F. 3d 122 (5th Cir. 1994)(doctor said nothing further could be done); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988). Medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). A date of permanency may not be based, however, on the mere speculation of a physician.[31] *See Steig v. Lockheed Shipbuilding & Construction Co.*, 3 BRBS 439, 441 (1976). Furthermore, evidence of the ability to do alternate employment is not relevant to the determination of permanency. *Berkstresser v. Washington Metro. Area Transit Authority*, 16 BRBS 231, 234 (1984), *rev'd on other grounds sub nom., Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990).

An Administrative Law Judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. *Thompson v. Quinton Engineers*, 14 BRBS 395, 401 (1985). In the absence of any other relevant evidence, the judge may use the date the claim was filed. *Whyte v. General Dynamics Corp.*, 8 BRBS 706, 708 (1978).

Where the medical evidence indicates that the worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986). Similarly, where a treating physician stated that surgery might be necessary in the future and that the claimant should be reevaluated in several months to check for improvement, it was reasonable for the Administrative Law Judge to conclude the

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[31] In *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 75 (1997), the Board found it proper to credit a physician's opinion setting an MMI date after issuance of ALJ's decision based on the normal healing period following knee surgery and not merely on the eventuality the condition may further improve in the future.

claimant's condition was temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986), *pet. dismissed sub nom., Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011 (11th Cir. 1987); *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983).

Permanent disability has been found where little hope exists of eventual recovery, *Air America, Inc. v. Director, OWCP*, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, where work within claimant's work restrictions is not available, *Bell v. Volpe/Head Construction Co.*, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone.[32] *Eller and Co. v. Golden*, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, *Ballard v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 676 (1978); *Ruiz v. Universal Maritime Service Corp.*, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. *Bell, supra. See also Walker v. AAF Exchange Service*, 5 BRBS 500 (1977); *Swan v. George Hyman Construction Corp.*, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability. *Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21 (1979); *Perry v. Stan Flowers Company*, 8 BRBS 533 (1978).

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. *Exxon Corporation v. White*, 617 F.2d 292 (5th Cir. 1980), *aff'g* 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. *Fleetwood v. Newport News Shipbuilding and Dry Dock Company*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); *Watson v. Gulf Stevedore Corp., supra*..

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[32] Claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award notwithstanding considerable evidence the claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc*., 948 F.2d 941, 25 BRBS 78 (5th Cir. 1991).

On the basis of the totality of the record, I find and conclude that the claimant reached maximum medical improvement on July 23, 2001, the date Dr. Holden returned him to full duties and that he has been permanently and partially disabled from July 23, 2001, according to the well-reasoned opinion of Dr. Holden and the Claimant's own testimony. He was temporarily and partially disabled from February 13, 2001, until July 23, 2001, the date of permanency.

3. CONCLUSIONS REGARDING NATURE & EXTENT OF DISABILITY

In conclusion, based on the credible testimony of the claimant, and fully supported by the medical opinions of the long-time treating physician, Dr. Holden, I find that the claimant is entitled to temporary partial[33], permanent partial[34], and, temporary total disability benefits.

MEDICAL EXPENSES AND BENEFITS

Section 7(a) of the LHWCA provides that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a); *see also* 20 C.F.R. § 702.401. In order for a claimant to receive medical expenses, his injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). If an employer is found to be liable for the payment of compensation pursuant to an award of disability, it follows, in accordance with Section 7(a), that the employer is likewise liable for medical expenses incurred as a result of the claimant's injury. *Perez v. Sea-Land Servs, Inc.*, 8 BRBS 130, 140 (1978).[35] In fact, at least for cases arising in the Fifth Circuit, even if an employee is not entitled to disability benefits, an employer may still remain liable for medical benefits for a work-related injury. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001) citing *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993).

A claimant has established a prima facie case for compensable medical treatments when a physician finds treatment necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). In order for an employer to be liable for a claimant's medical expenses pursuant to Section 7(a), the expenses must be reasonable and

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[33] One who is temporarily and partially disabled is entitled to the usual measure of benefits but for only five years.

[34] One with a scheduled injury is presumed to be disabled even though the injury does not actually affect his earnings. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (July 17, 2001) citing *Bath Iron Works Corp.*, 506 U.S. 153, 113 S.Ct. 692, 121 L.Ed.2d 619, 26 BRBS 151(CRT). In contrast, for non-schedule injuries, loss of wage-earning capacity is an element of the claimant's case.

[35] *See Shriver v. General Dynamics Corp.*, 34 BRBS 370(ALJ)(2000) for an exhaustive list of medical expenses the appellate courts and the Board have approved and disapproved.

necessary.[36] *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The employer must raise the issue of reasonableness and necessity of treatment. *Salusky v. Army Air Force Exchange Service,* 2 BRBS 22, 26 (1975). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 22 (1988); *Barbour v. Woodward & Lothrop, Inc*., 16 BRBS 300 (1984).

An employee's right to select his own physician, pursuant to Section 7(b), is well-settled. *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978); 20 C.F.R. § 702.403; *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998) *modified*, 164 F.3d 480 (1999). A claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. *Tough v. General Dynamics Corporation*, 22 BRBS 356 (1989); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978); 20 C.F.R. § 702.401(a); *but see Shoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996)(expenses may be limited to those costs which would have been incurred locally).

In *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. *Banks v. Bath Iron Works Corp.*, 22 BRBS 301, 307, 308 (1989); *Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 15 BRBS 299 (1983); *Beynum v. Washington Metropolitan Area Transit Authority*, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. *Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971); *Matthews v. Jeffboat, Inc.*, 18 BRBS at 189 (1986). The burden of proving compliance with section 7(d) is on the claimant. *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 407, 10 BRBS 1, 8 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977).

An employer's physician's determination that the claimant is fully recovered is tantamount to a refusal to provide treatment. *Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780 (D.C. Cir. 1984); *Walker v. AAF Exchange Service*, 5 BRBS 500 (1977); *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968, 970 (D.C. Cir. 1982) (per curium), *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. *Roger's Terminal and Shipping Corporation v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1986); *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989); *Ballesteros v. Willamette Western Corp*., 20 BRBS 184 (1988).

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[36] The employer is liable for medical services for all legitimate consequences of the compensable injury, including the chosen physician's unskillfulness or errors of judgment. *Linsay v. George Wash. Univ*., 279 F.2d 819 (D.C. Cir. 1960); *see also Austin v. Johns-Manville Sales Corp*., 508 F.Supp. 313 (D. Me. 1981).

In the present case, Dr. Holden's wrote, "I don't think anything will make this man happy." (CX 11-34). He added, "Full duty. There is no disability based on loss of motion or loss of tissue at the present time." (CX 11-35). This amounts to a refusal of treatment. It is not contradicted that the Claimant continues to experience left knee pain with difficulty climbing ladders and depressing truck clutches. In light of this, he is entitled to further reasonable medical care at the employer's expense.

In light of my findings above that the claimant is permanently partially disabled due to his left knee injuries, I find treatment for his left knee difficulties compensable under the Act.[37]

AVERAGE WEEKLY WAGE

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983) *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984); *Hoey v. General Dynamics Corporation*, 17 BRBS 229 (1985); *Pitts v. Bethlehem Steel Corp.*, 17 BRBS 17 (1985); *Yalowchuck v. General Dynamics Corp.*, 17 BRBS 13 (1985). Compensation should be calculated at the time of disability, not the time of the injury. *Johnson v. Director, OWCP*, 911 F.2d 247 (9th Cir. 1990); *Bourgeois v. Avondale Shipyards & Director, OWCP*, 121 F.3d 219, 31 BRBS 137(CRT)(5th Cir. 1997); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

The Act provides three methods for computing a claimant's average weekly wage: the first, where an employee has worked in his regular employment substantially the whole of the year preceding his injury; the second, where the employee did not so work; and, the third, where neither of the former two methods can be reasonably and fairly applied.

The parties have stipulated and I find that the claimant's average weekly wage was $ 412.22 at the time of his initial injury and disability.

V. CONCLUSIONS

I find that Mr. Farquhanson is now partially and permanently disabled from performing his employment as a mechanic. However, the degree of disability was not in issue in the matter before me. The evidence establishes his alleged back injury was not caused or aggravated by his employment. The responsible employer/carrier is Tidewater Construction Corporation. The date of maximum medical improvement for his knee injury is July 23, 2001, at which time his disability became permanent. His average weekly wage is $ 412.22. The Claimant continues to be

[37] See 20 C.F.R. § 702.413 when there is a dispute concerning the amount of a medical bill.

employed at Tidewater. The employer will be liable for all reasonable and necessary medical expenses incurred in the treatment of the claimant's partial and permanent disability as the claimant's condition may require. The employer has paid compensation under state worker's compensation laws for the August 1999 injury and the claimant seeks no further compensation for that. The employer is entitled to appropriate credit for any such benefits paid.[38]

VI. ATTORNEY'S FEES AND COSTS

Thirty (30) days is hereby allowed to the claimant's counsel for the submission of such an application. See, 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the partes, including the claimant, must accompany the application. Parties have fifteen (15) days following receipt of any such application within which to file any objections.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The matter is remanded to the District Director for further development of the medical evidence by the parties.

2. Pursuant to § 7 of the Act, the employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the claimant's work-related injury referenced herein may require, subject to the provisions of section 7 of the Act.

3. The claimant shall be entitled to choose his own physician under the procedures set forth in the applicable regulations.

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RICHARD A. MORGAN
Administrative Law Judge

RAM:dmr

[38] Employer is entitled to credit for amounts paid a claimant under a state workers' compensation law for the same injury or disability. *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001) at 82 n. 8.

APPEAL RIGHTS: Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a notice of appeal with the district director for the compensation district in which the decision or order appealed from was filed, within thirty (30) days of the filing of the decision or order, and by submitting to the Board a petition for review, in accordance with the provisions of part 802 of 20 C.F.R..